SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-947

ATLANTIC MARINE, INC., *Petitioner*

v.

JIG THE THIRD CORP., JAMES I. GEORGE, JR., JAMES I. GEORGE, III, PURITAN MARINE INSURANCE UNDERWRITERS CORP. AND Y. E. HALL, INC., *Respondents*

JOINT BRIEF OF ALL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Jig III Corporation, James I. George, Jr., James I. George, III, Puritan Marine Insurance Underwriters Corporation and Y. E. Hall, Inc., jointly pray that the Petition of Atlantic Marine, Inc. for Writ of Certiorari be refused, and, in support of that prayer, would respectfully show as follows:

QUESTIONS PRESENTED FOR REVIEW

Respondents submit that Petitioner's "Question Presented" (Pet. for Writ, p. 3) is inaccurate and incomplete. Moreover, Petitioner's discussion under the question con-

tains at least two errors. First, the Court of Appeals never held that the parties were of equal bargaining power. Second, the product itself (the vessel) was not the only thing that sank and was lost, also lost were the vessel's gear, engines, navigational equipment and rigging.

Respondents submit that the issues of law relevant to the contentions of Petitioner against Respondents should be framed as follows:

I.

Whether the Court of Appeals was correct in holding that general maritime tort law was applicable.

II.

Whether the Court of Appeals was correct in holding that Petitioner's warranty was insufficient to disclaim its responsibility for negligence.

III.

Whether the Court of Appeals was correct in holding that loss of the product itself can be recoverable under a cause of action for tort negligence.

STATEMENT OF THE CASE

Because the Statement of the Case presented by Petitioner (Pet. for Writ, p. 3) is inaccurate, incomplete and misleading, Respondents are compelled to expand and correct the statement of the case as follows:

(1) The Court of Appeals for the Fifth Circuit in its majority opinion reported at 519 F.2d 171, and which is contained in the Appendix to this brief beginning at page

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A-1, properly noted that the property loss included not only the shrimp boat the PRINCESS KE AH SOM PAH (hereinafter PRINCESS), but also its gear, engines, navigational equipment and rigging. (A. 2, 3).

(2) The case was submitted to the jury in the Trial Court on special interrogatories relating *not only* to strict liability in tort but also to negligence (R. 287-289), and the jury found, based on substantial evidence, that Petitioner Atlantic Marine was negligent in the manufacture and/or design of the PRINCESS, and that such negligence was a proximate cause of the vessel's sinking. (R. 288) (A. 3).

(3) The Court of Appeals properly held that Respondents' tort action was governed by the general maritime law. (A. 5).

(4) The Court of Appeals correctly recognized that Petitioner fundamentally misapprehended the distinction between tort and contract, since Petitioner assumes that the "former" tort of negligent design and manufacture was really nothing more than a sort of quasi-contractual warranty of non-negligent design and manufacture. (A. 7). Indeed, Petitioner has in its brief overlooked the doctrine of negligence in tort law and has spoken only of products liability and warranty, which are two distinct theories of recovery.

(5) The Court of Appeals correctly held that Petitioner's written warranty was ineffective and failed as a defense to Respondents' tort action based on negligence. (A. 13, 14, 15). The Fifth Circuit found that either under general maritime law or Florida law the language used by Petitioner in its warranty was an inadequate disclaimer of negligent design and construction, especially since

Petitioner had made no specific mention in its warranty of either "negligence" or of "tort liability." (A. 13).

(6) The Fifth Circuit properly recognized that numerous federal cases have held that a manufacturer's negligent design or manufacture of a product gives rise to a cause of action in tort, even where the only damage is to the purchased chattel itself. (A. 7).

FACTS CORRECTED

Respondents also submit that the facts stated in Atlantic Marine's petition (pp. 5-7) are misleading and incomplete in the following respects:

(1) The Petition at page 5 states: "Over a period of time, they (representatives of the corporation JIG III) discussed the requirements with AMI (Petitioner) personnel and, as a result of these conferences, decided to purchase three shrimp boats from AMI. Preceding the agreement to purchase, the parties discussed the boat requirements such as vessel capabilities, design, shaft assemblies, prices and delivery dates. The parties reached an agreement which was reflected in the contract for each shrimp boat to be manufactured and purchased." Petitioner, however, fails to point out that the boats purchased, especially the PRINCESS, was already built and in the water with its shaft installed at the time of the purchase. (R. 162, 163, 180, 181). Also see (A. 14, note 8).

(2) The jury's finding that Atlantic Marine had negligently designed and constructed the PRINCESS' shaft assembly, and that such negligence was the proximate cause of the vessel's sinking was amply supported by the evidence and was never challenged by Petitioner. (A. 4).

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(3) Respondent James I. George, Jr. was assured by Petitioner's representatives that the shaft already installed in the PRINCESS when purchased "would more than do the job." (R. 63, 164).

(4) Respondent James I. George, Jr. merely "glanced over" Petitioner's contract (R. 184) and he did *not* testify that he understood the warranty provisions as alleged by Petitioner (R. 185 - 189), nor is there any evidence in the record that his son, Respondent James I. George, III, who signed the contract, understood the contract or its confusing and misleading warranty provision.

(5) Although Petitioner is incorrect in stating that the doctrine of strict liability in tort has no application to the facts of this case, such contention is *moot* since the Fifth Circuit affirmed the jury's verdict based on the jury's finding of negligence, which is a different theory from strict liability in tort.

(6) It is incorrect to say that the lower courts failed to pass upon Petitioner's warranty (set out on p. 9 of the Appendix) and its alleged disclaimer because as pointed out hereinabove under Comment 6 of Statement of the Case, the Fifth Circuit (and the trial court by its rulings) held that Petitioner's language was ineffective as a disclaimer of negligence.

REASONS FOR REFUSING TO GRANT THE WRIT

Respondents submit that review on writ of certiorari should not be granted. None of the issues raised by Petitioner in this case warrant the granting of a writ. The reasons for refusing to grant the writ are as follows:

1. The decision of the Court of Appeals below is not in conflict with any decision of any other court of appeals.

2. The decision is not in conflict with any decision of this Supreme Court.

3. No important question of federal law is raised by the case which needs to be settled by this Court now.

4. The Court of Appeals has not decided any federal question in a way in conflict with applicable decisions of this Court.

5. No necessity has been shown to call for an exercise of this Court's power of supervision.

6. At best Petitioner raises issues the resolution of which are of importance to the parties, but not significant to the public.

7. At best the Petitioner has raised abstract questions of law the resolution of which will not alter the holdings of the Court of Appeals. As Respondents will show herein, Petitioner has completely overlooked, disregarded and/or misapprehended the holdings of the Court of Appeals.

ARGUMENT

I.

Whether the Court of Appeals was correct in holding that general maritime tort law was applicable.

For their argument and authorities on this issue, Respondents adopt the discussion and holding of the Court of Appeals for the Fifth Circuit under Points 3 and 4. (A. 5, 6).

The Fifth Circuit noted that when an ocean-going shrimp boat sinks in 15 fathoms of water in the Gulf of Mexico, and the sinking is allegedly tortious, there

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is maritime locality plus a significant relationship to traditional maritime activity and the tort, if recognized by the law, is maritime in nature. See *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 268; 93 S. Ct. 493, 505 (1972) (A. 5).

The Fifth Circuit noted further: "When, however as in this case, the allegedly tortious act or omission causes an ocean-going vessel to sink on the high seas and the act occurred during the shipbuilding process, the interests of admiralty overbalance those which any state might have." (A. 6).

II.

Whether the Court of Appeals was correct in holding that Petitioner's warranty was insufficient to disclaim its responsibility for negligence.

The Court of Appeals thoroughly examined and discussed Petitioner's warranty in light of the language of the warranty itself and of the case law as determined by the federal courts and Florida courts (A. 9-15), on the basis of which it properly concluded that Atlantic Marine did not have a clear and unequivocal disclaimer of its liability for negligence under either general maritime law or Florida law (A. 13-15).

Petitioner's contractual defense had no merit because the language of Petitioner's contract failed to disclaim liability for negligence. Nowhere in its warranty did Petitioner specifically mention or use words such as "negligence," "tort" or cognates thereof.

Atlantic Marine at page 11 of its Petition relies on the case of *Delta Airlines, Inc. v. Douglas Aircraft Co.,* 238

Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965), which held that Delta—the purchaser of an airplane from Douglas—could not recover the costs to repair the airplane based on a finding of negligent manufacture. However, Petitioner failed to mention that the warranty of Douglas Aircraft in *Delta Airlines, supra,* made reference to the word "negligence", and that such warranty was much longer and detailed than Petitioner's warranty. By way of illustration Section (E) of the Douglas' warranty reads as follows:

> "(E) The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guaranties, conditions or liabilities, express or implied, arising by law or otherwise (including without limitation any obligation of the Seller with respect to consequential damages) and whether or not occasioned by Seller's *negligence* and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer; provided, that in the event the provisions relieving Seller from liability for its *negligence* should for any reason be held ineffective, the remainder of this paragraph (E) shall remain in full force and effect." 47 Cal. Rptr. 518 at 521. (emphasis added)

Petitioner's warranty (unlike that of Douglas Aircraft) did not make any references to negligence or tort, and therefore any alleged disclaimer on its part was invalid because it was vague and ambiguous.

The Court of Appeals in the instant case cited several cases in its opinion (A. 11, 12) for the proposition that courts will not enforce a disclaimer of negligent design and manufacture, unless the contractual language is clear and unequivocal.

The Fifth Circuit cited the case of *Keystone Aeronautics Corporation v. R. J. Enstrom Corp.*, 499 F.2d 146 (3rd Cir. 1974). Petitioner has cited the trial court's decision in *Keystone* (Pet. for Writ p. 11) which decision was reversed by the Third Circuit in *Keystone, supra.*

Keystone, supra, was a case involving an action brought by the buyer of used helicopters against the manufacturer to recover property damage sustained when one of the craft crash-landed, without personal injury to anyone. Plaintiff sought recovery on theories of negligence and strict liability. The Third Circuit in reversing the trial court found that the defendant had not properly disclaimed its negligence and strict liability, and therefore plaintiff could try to prove its theories in order to recover for the loss of the product. The defendant in the *Keystone* case did not mention the words "negligence", "tort" or cognates thereof in its warranty.

In *Sterner Aero AB v. Page Airmotive, Inc.*, 499 F.2d 709 (10th Cir. 1974) the warranty agreement was carefully negotiated through correspondence between parties in relatively equal bargaining power (in contrast to the instant case where there was no prolonged negotiations concerning the contract warranty and no equal bargaining power). The question before the Tenth Circuit was whether the language: "This warranty is expressly in lieu of any and all other warranties or representations expressed or implied," effectively barred a tort action so as to justify the granting by the trial court of the defendant's motion for summary judgment. The Tenth Circuit (499 F.2d at 713) found that the negotiated warranty disclaimer had failed to bar actions based on strict products liability or negligence, and therefore plaintiff was entitled to sue to

recover for the loss of the product (a plane which crashed).

III.

Whether the Court of Appeals was correct in holding that loss of the product itself can be recoverable under a cause of action for tort negligence.

Petitioner contends (Pet. for Writ, p. 9) that there is "no strict liability in tort where only damage is to the product itself," and then proceeds to discuss cases thereunder. However, as already observed, Petitioner has completely overlooked, disregarded and/or misapprehended the jury's finding in the Trial Court and the Fifth Circuit's affirmance thereof that the purchaser of the vessel PRINCESS was entitled to recover for the loss of the vessel and its valuable equipment because of the negligent manufacture and/or design of the vessel by Atlantic Marine (A. 3). Negligence and strict liability in tort are two different grounds of recovery. See, for example, *Sterner Aero AB v. Page Airmotive, Inc., supra.*

A tort cause of action exists here and the damage to the shrimp boat can be recovered. In *Dudley v. Bayou Fabricators, Inc.,* 330 F.Supp. 788 (S.D.Ala. 1971), wherein a plaintiff whose shrimp boat had been damaged by fire brought suit against the boat builder for breach of implied warranty and negligent construction, recovery was granted to plaintiff for the damages to his vessel because of its negligent construction. See other cases cited by the Court of Appeals in its opinion. (A. 8, 9).

Furthermore, Petitioner's contention that loss of property or the product itself is not recoverable under the doctrine of strict liability in tort is also without merit.

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Section 402A of the Restatement of Torts states in part:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, *or to his property.*" (emphasis added)

Although quoting extensively from *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), Petitioner overlooks the point that recovery for damages to the product itself would have been allowed if there had been a finding of a defective product. In *Seely* plaintiff purchased a truck which was beset with mechanical problems and which overturned when the brakes failed, causing some $5,000 worth of physical damage to the truck. After about eleven months of trouble, plaintiff refused to make further payments and defendant repossessed the truck. Plaintiff then sued defendant for the damages to the truck when it overturned for the amount of payments theretofore made on the truck and for loss of profit when the truck was broken down. The California Supreme Court sustained the lower court's award of damages for loss of profits and money paid on the purchase price on the theory of breach of express warranty, and further stated that the defendant would have been liable to plaintiff for physical damage to the truck, if there had been a fact finding that the damage to the product itself was due to a defect. (403 P.2d at 152).

As noted by the Court of Appeals in its opinion (A. 7) recent cases have demonstrated that a manufacturer's negligent design or manufacture of a product gives rise to a cause of action in tort (even where the

aggrieved buyer is the economic equal of seller) and where the only damage is to the purchased chattel itself. The Court cited *Sterner Aero AB v. Page Airmotive, Inc., supra,* and *Keystone Aeronautics Corporation v. R. J. Enstrom Corp., supra.*

CONCLUSION

The material issues in this case do not appear to involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties"; nor does the case pose any ". . . real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals". *Layne & Bowler Corporation v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

Moreover, Petitioner has completely overlooked, disregarded, and/or misapprehended the well established ground of recovery based on negligence and has not directed its Petition to the crux of the Fifth Circuit's opinion.

As Respondents have shown herein, Petitioner has not clearly formulated the issues and has conveniently overlooked the Fifth Circuit's finding, upholding the jury finding that Petitioner negligently manufactured and designed the vessel. The issue covering strict products liability is irrelevant to the decision of this case, even though under strict liability in tort Respondents would be entitled to recover against Petitioner. All the seemingly significant issues argued by Petitioner are in reality academic and moot. They do not warrant this Court's review. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955).

For the reasons stated, Respondents respectfully submit that the opinion of the Court of Appeals is correct

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and that the Petition of Atlantic Marine, Inc. for Writ of Certiorari should be refused.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition to Petition by Atlantic Marine, Inc. for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following counsel: Mr. George D. Gabel, Jr., Wahl and Gabel, 405 Florida Title Building, Jacksonville, Florida 32202; and W. T. Womble, Baker and Botts, 3000 One Shell Plaza, Houston, Texas, 77002, Attorneys for Petitioner, on this ____ day of February 1976.

JACK G. CARINHAS, JR.
Attorney for Respondents

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APPENDIX

JIG THE THIRD CORPORATION,
Plaintiff-Appellee,

v.

PURITAN MARINE INSURANCE UNDERWRITERS CORPORATION et al., Defendants-Third Party Plaintiffs-Appellees,

ATLANTIC MARINE, INC.,
Third Party-Defendant-Appellant

James I. GEORGE, Jr., et al.,
Plaintiffs-Appellees,

v.

ATLANTIC MARINE, INC.,
Defendants-Appellants.

JIG THE THIRD CORPORATION et al.,
Plaintiffs-Appellees,

v.

Y. E. HALL, INC., Defendant-Third-Party Plaintiff-Appellee,

ATLANTIC MARINE, INC.,
Third-Party-Defendant-Appellant.

No. 74-2709.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

September 15, 1975.

Purchaser-owner of shrimp boat brought action against shipbuilder-seller for loss of the shrimp boat which sank in the Gulf of Mexico. The United States District Court for the Southern District of Texas, Reynaldo G. Garza, Chief Judge, rendered judgment for the purchaser-owner and the shipbuilder-seller appealed. The Court of Appeals, Goldberg, Circuit Judge, held that the purchaser-owner had a maritime tort action rather than a contract action against the shipbuilder-seller; that the purchaser-owner was entitled to present its theory and evidence of negligent design and construction to the jury; and that the written warranty was not such a clear and unequivocal disclaimer of liability for negligence as to preclude recovery.

Affirmed.

Gee, Circuit Judge, dissented and filed opinion.

W. T. Womble, Houston, Tex., Marshal Graham, Harlingen, Tex., George D. Gabel, Jr., Jacksonville, Fla., for Atlantic.

Paul Q. O'Leary, Paul Y. Cunningham, Jr., Brownsville, Tex., for Puritan Marine Insurance Underwriters Corp. and Y. E. Hall, Inc.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

On August 28, 1971, M/V PRINCESS KE AH SOM PAH, a shrimp boat, sank in 15 fathoms of water in the Gulf of Mexico south of Port Aransas, Texas. There was no loss of life or personal injury, but the vessel itself and

its gear, including its engines, navigational equipment and rigging, were claimed by the sea. The owners of the PRINCESS, James I. George, Jr., James I. George, III and JIG III Corporation [referred to collectively hereafter as JIG III], sued the vessel's manufacturer, Atlantic Marine, Inc., advancing three theories of recovery: one in contract—bearch of warranty—and two in tort—negligent design and construction and strict liability.[1] After a trial, the jury found that the sinking of the PRINCESS resulted from a defect in the design or construction of the boat.[2] The jury also found in answer to a special interrogatory that Atlantic Marine was negligent in the "design and/or manufacture of the vessel." Atlantic Marine appeals, contending that JIG III's remedy, if any, must be found within the four corners of the contract of sale. We believe, however, that nothing in that contract can be construed to exonerate Atlantic Marine of liability for its own negligent design or construction of the PRINCESS, and we affirm the jury's verdict on that basis.

I

[1, 2] At trial, JIG III endeavored to prove that Atlantic Marine had negligently designed and constructed the

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1. A second suit, *JIG The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, No. CA 72-B-121, was consolidated in the district court with JIG III's action against Atlantic Marine. A third case, *JIG The Third Corp. v. Y. E. Hall, Inc.*, No. CA 73-B-142, was apparently not consolidated but affected the judgment below. In each case, the defendants impleaded Atlantic Marine as a thrid-party defendant. Prior to trial, Puritan, JIG III's apparently insolvent insurer, entered into a consent decree with JIG III for the limit of its policy, $90,000. The district court's order accepting this settlement is not disturbed by our opinion.

2. The shaft assembly was defective in design or construction; the defect caused severe leakage which eventually sunk the PRINCESS.

PRINCESS' shaft assembly, and that this negligence was the proximate cause of the vessel's untimely demise. Plaintiff's several expert witnesses testified that Atlantic Marine's utilization of a 4½-inch, cold-rolled steel shaft instead of the standard 4-inch, stainless steel shaft for its boats was very unsound, and that this design was not approved by the American Bureau of Shipbuilders. These witnesses also noted other defects in the shaft assembly. Finally, JIG III showed that three other Atlantic Marine-built shrimpboats of similar design had either sunk or suffered serious damage as a result of the same sort of malfunction as that which led to the loss of the PRINCESS. In sum, especially considering the fact that upon review of the sufficiency of the evidence to support a jury verdict, this Court must view that evidence in the light most favorable to the prevailing party below, *Boeing Co. v. Shipman*, 5 Cir. (*en banc*) 1969, 411 F.2d 365, 374, we believe that there was ample evidence to support the jury's finding of negligent design and construction by Atlantic Marine.

Atlantic Marine contends, however, that whatever the evidence may have been, it ought not to have been submitted to the jury, for in the particular circumstances of this case, JIG III must obtain recompense on a contract theory or not at all, so that there was properly no tort theory for the jury to consider. Atlantic Marine reasons that where, as here, the genesis of the relationship between two parties is contractual in nature, where the parties are of relatively equal bargaining power, and where the only loss complained of is the loss of the chattel which was the subject of the contract, the aggrieved buyer is limited to the remedies afforded by that document. This result is said to be the only proper one because

the buyer and seller in such a situation clearly intended that all their future relations with respect to the chattel should be governed by the terms of the bargained for contract of sale, and because another result, that is, the availability of a tort action to the buyer, would upset the finely-tuned economic calculations which underlay the making of the initial agreement.

[3, 4] We preface our discussion of this issue by pointing out that the law governing the existence of any tort-based cause of action here is the general maritime law. When an ocean-going shrimpboat sinks in 15 fathoms of water in the Gulf of Mexico and the sinking is allegedly tortious, there is maritime locality plus a significant relationship to traditional maritime activity, and the tort, if recognized by the law, is maritime in nature. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 1972, 409 U.S. 249, 268, 93 S.Ct. 493, 505, 34 L.Ed.2d 454, 467;[3] *In re Motor Ship Pacific Carrier,* 5 Cir. 1974, 489 F.2d 152, 154-55, *cert. denied sub nom. Union Camp Corp. v. Gypsum Carrier, Inc.,* 417 U.S. 931, 94 S.Ct. 2643, 41 L.Ed.2d 235; *Union Oil Co. v. Oppen,* 9 Cir. 1974, 501 F.2d 558, 560-63. This would be true even though the conduct complained of may have been negligent construction or defective design and may have occurred ashore. *See Watz v. Zapata Off-shore Co.,* 5 Cir.

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3. *Executive Jet,* of course, was more concerned with admiralty jurisdiction than with the question of what law was applicable. As we have noted, however:

> Choice of law questions raised in a maritime context have traditionally been analyzed in jurisdictional terms . . . because as a general rule "[o]nce admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable.

In re Dearborn Marine Service, Inc., 5 Cir. 1974, 499 F.2d 263, 277 n. 27, reh. denied, 5 Cir. 1975, 512 F.2d 1061.

1970, 431 F.2d 100, 112-14; *Oppen v. Aetna Ins. Co.*, 9 Cir. 1973, 485 F.2d 252, 256. Of course, under certain circumstances and on familiar conflicts principles, a court applying the general maritime law might look to the law of a particular state when that state has strong contacts with the parties or other legitimate interests. This would be especially appropriate when the relationship of the allegedly tortious behavior to traditional maritime behavior is enough to confer admiralty jurisdiction but is, in the main, slight. *See Watz v. Zapata Off-Shore Co., supra.* When, however, as in this case, the allegedly tortious act or omission causes an oceangoing vessel to sink on the high seas and the act occurred during the shipbuilding process, the interests of admiralty overbalance those which any state might have.

[5] The basic difficulty with Atlantic Marine's contention that JIG III's grievance against it must be resolved solely within the bounds of their contractual relationship is that torts ordinarily are not considered to constitute a part of any contractual relationship. On the contrary, the common assumption is that parties intend their contractual relations to be governed by the law of contract, and their tortious relations, if any, to be governed by the law of torts; this is true even if the tortfeasor is a seller, the victim the buyer, and the only loss is property damage to a chattel purchased by the buyer from the seller. As Dean Prosser remarks:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself.

W. Prosser, The Law of Torts § 101 at 665-66 (4th ed. 1971). Numerous recent cases have demonstrated that a manufacturer's negligent design or manufacture of a product gives rise to a cause of action in tort, even where the aggrieved buyer is the economic equal of the seller and where the only damage is to the purchased chattel itself. *See, e.g., Sterner Aero AB v. Page Airmotive, Inc.*, 10 Cir. 1974, 499 F.2d 709; *Keystone Aeronautics Corp. v. R. J. Enstrom Corp.*, 3 Cir. 1974, 499 F.2d 146; *Continental Grain Co. v. Fegles Const. Co.*, 8 Cir. 1973, 480 F.2d 793; *Neville Chemical Co. v. Union Carbide Corp.*, 3 Cir. 1970, 422 F.2d 1205, cert. denied, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55.

Atlantic Marine suggests, however, that whatever the law may once have been, the Uniform Commercial Code's implied warranty of merchantability, U.C.C. § 2-314,[4] has subsumed the tort of negligent design and manufacture, thus turning a tort claim into a contractual one. We believe that this argument fundamentally misapprehends the distinction between tort and contract, for it assumes that the "former" tort of negligent design and manufacture was really nothing more than a sort of quasi-contractual warranty of non-negligent design and manufacture. While

4. Section 2-314 provides:

(1) Unless excluded or modified (Section 2-316) a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and . . .

(c) are fit for the ordinary purposes for which such goods are used . . . .

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

such a legal abstraction might well provide the missing link in products liability law, we have been unable to find any precedential traces of this creature, and we conclude that it has never existed in corporeal form. Dean Wade recently addressed this same problem and reached this result, reasoning that the complete absence of any U.C.C. provisions dealing specifically with negligence is "quite significant," for at the time of the Code's adoption, the law of products liability—including a seller's liability for negligent design and manufacture—was well established, so that if the U.C.C. had been intended to supplant the law of negligence, its framers would certainly have said so. Dean Wade believes that the legislative history of the U.C.C. firmly supports his—and our—conclusions.[5] *See* Wade, Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?, 42 Tenn.L.Rev. 123, 131-35 (1974).

[6] The admiralty courts have followed the general rule that a tort cause of action exists in a situation such as that presented by this case. *See Houston-New Orleans, Inc. v. Page Engineering Co.*, E.D.La. 1972, 353 F.Supp. 890, 899; *Sears, Roebuck & Co. v. American President Lines, Ltd.*, N.D.Cal. 1971, 345 F.Supp. 395, 402; *Taisho Fire & Marine v. Vessel Montana*, N.D.Cal.1971, 335 F.Supp. 1238, 1239; *Dudley v. Bayou Fabricators, Inc.*,

5. To Atlantic Marine's warning that the availability of a tort action to parties situated as JIG III here will turn every properly contractual breach of warranty case into a tort case, we can only reply that the state of the law is clearly opposed to its position, and observe that there is a great deal of difference between proving that a product does not work and that it has been negligently designed or manufactured. *See, e. g., Weakley v. Fischbach & Moore, Inc.*, 5 Cir. 1975, 515 F.2d 1260; *Ward v. Hobart Mfg. Co.*, 5 Cir. 1971, 450 F.2d 1176; *Raybond Electronics, Inc. v. Glen-Mar Door Mfg. Co.*, 1974, 22 Ariz. App. 409, 528 P.2d 160.

S.D.Ala. 1971, 330 F.Supp. 788, 791; *cf. Alcoa S. S. Co. v. Charles Ferran & Co.*, 5 Cir. 1967, 383 F.2d 46, 50, cert. denied, 1968, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107; *see also Schaeffer v. Michigan-Ohio Navigation Co.*, 6 Cir. 1969, 416 F.2d 217, 221; *In re Alamo Transportation Co.*, S.D.Tex. 1970, 320 F.Supp. 631, 634. It follows that JIG III was entitled to present its theory and evidence of negligent design and construction to the jury.

II

Atlantic Marine also urges that even if JIG III has a tort claim against it, the terms of the shipbuilding contract itself prescribe a specific and exclusive remedy in the event of damage to the PRINCESS. Since the particular loss involved in this case does not fall within the ambit of the contractual remedy, Atlantic Marine reasons, the contract forecloses recovery on the tort claim. Article 7 of the contract provides:

> *Article 7—Warranty*
>
> . [Atlantic Marine] shall warrant its workmanship and materials for a period of six (6) months after date of delivery to the initial purchaser against defective workmanship and materials, subject to the succeeding provisions hereof. This warranty is limited to the repair or replacement of defective parts and material only, . . . as shall appear to [Atlantic Marine] upon inspection, to have been defective in materials and workmanship. . . . No other warranty of any kind is made or implied by [Atlantic Marine], including any losses of time or resultant damages sustained by the owner, and no recommendation of items by others shall imply or constitute any warranty with respect to those items.

The PRINCESS was delivered to JIG III in the summer of 1969, and the boat was not lost until August, 1971, so it does not appear that JIG III could recover damages under the express terms of the warranty.[6] JIG III contends, however, that the terms of the warranty were an inadequate disclaimer of Atlantic Marine's liability for negligent design and construction, so that Atlantic Marine's contractual defense must fail.

[7, 8] The general rule is that parties of relatively equal bargaining power may contract for the sale of a chattel whereby the seller disclaims any liability for commercial damage to the product which may result from the negligent design or manufacture thereof. *See, e. g., Continental Grain Co. v. Fegles Construction Co., supra,* 480 F.2d at 793; *Neville Chemical Co. v. Union Carbide Corp., supra,* 422 F.2d at 1216; *Southwest Forest Industries, Inc. v. Westinghouse Electric Corp.,* 9 Cir. 1970, 422 F.2d 1013, 1020, cert. denied, 400 U.S. 902, 91 S.Ct. 138, 27 L.Ed.2d 138; 2 L. Frumer & M. Freedman, Products Liability § 19.07(1). This exception to the ancient principle that a party may not immunize himself from the consequences of his own negligence is predicated upon the consideration that businessmen can bargain over which party is to bear the risk of damage and set the price accordingly, thus achieving a more rational distribution of the risk than the law would otherwise allow. *See Delta Air Lines, Inc. v. McDonnell Douglas Corp.,* 5 Cir. 1975, 503 F.2d 239, 242-43, cert. denied, 1975, ____U.S.____, 95 S.Ct. 1953, 44 L.Ed.2d 451; *Potomac Electric Power*

6. JIG III argues that the disclaimer of warranty is insufficient even as a contractual defense because the provision was inconspicuous and did not specifically disclaim the implied warranty of merchantability. In view of our disposition of this case, we need not resolve this issue.

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Co. v. Westinghouse Electric Corp., D.D.C. 1974, 385 F.Supp. 572, 579; *Royal Indemnity Co. v. Westinghouse Electric Corp.*, S.D.N.Y. 1974, 385 F.Supp. 520, 524-25. The rationale presupposes that the contracting parties have in fact considered the relative costs of insuring against negligent design and manufacture and have incorporated their conclusions into the contract. For this reason, although a seller's disclaimer of negligence will be enforced where the contract specifically mentions "negligence," "tort" or cognates thereof, *see, e.g., Delta Air Lines, Inc. v. McDonnell Douglas Corp., supra,* 503 F.2d at 242-43; *Philco Corp. v. "Automatic" Sprinkler Corp.*, 7 Cir. 1964, 337 F.2d 405, 407; *Potomac Electric Power Co. v. Westinghouse Electric Corp., supra,* 385 F.Supp. at 575-77; *Royal Indemnity Co. v. Westinghouse Electric Corp., supra,* 385 F.Supp. at 524-25; *Iowa Electric Light and Power Co. v. Allis-Chalmers Mfg. Co.*, S.D. Iowa 1973, 360 F.Supp. 25, 33, the courts will not enforce a disclaimer of negligent design and manufacture, even in a commercial context, unless the contractual language is clear and unequivocal.[7] *See, e. g., James F. O'Neil Co.*

7. The various jurisdictions are divided in their interpretations of the "clear and unequivocal" rule. Some states, such as New York, require explicit use of the words "negligence," "tort" or their cognates. *See Willard Van Dyke Productions, Inc. v. Eastman Kodak Co.*, 1963, 12 N.Y.2d 301, 239 N.Y.S.2d 337, 189 N.E.2d 693; *Boone Valley Cooperative Processing Assoc. v. French Oil Mill Machinery Co.*, N.D. Iowa 1974, 383 F.Supp. 606, 613-15; *Becker Pretzel Bakeries,, Inc. v. Universal Oven Co.*, D.Md. 1968, 279 F.Supp. 893, 900; *Pan American World Airways v. United Aircraft Corp.*, 1960, 3 Storey 7, 53 Del. 7, 163 A.2d 582. Other states, such as Illinois, require no specific wording but instead search the contract for a clear expression of the requisite mutual intent, giving a "fair and reasonable interpretation based upon a consideration of all of its language and provisions." *Tatar v. Maxon Construction Co.*, 1973, 54 Ill.2d 64, 67, 294 N.E.2d 272, 273-74. *See Rutter v. Arlington Park Jockey Club*, 7 Cir. 1975, 510 F.2d 1065, 1066-67; *Gates*

v. U. S. Fidelity & Guaranty Co., 5 Cir. 1967, 381 F.2d 783, 786; *Sterner Aero AB v. Page Airmotive, Inc., supra*, 499 F.2d at 714; *Keystone Aeronauties Corp. v. R. J. Enstrom Corp., supra*, 499 F.2d at 150; *Gimbel Brothers, Inc. v. William H. Vanderherschen, Inc.*, 3 Cir. 1972, 468 F.2d 597, 599; *Neville Chemical Corp. v. Union Carbide Corp., supra*, 422 F.2d at 1217-20; L. Frumer & M. Freedman, *supra*, § 19.07(1).

[9] We have been unable to discover any prior case involving a maritime tort claim based upon the negligent design and construction of a chattel where the buyer and seller thereof enjoyed relatively equal bargaining power and where the only damage was to the purchased article itself. We are thus faced with another choice of law problem, for although the terms of the warranty here were introduced as a defense to a martime tort claim, contracts to build ships are not generally considered to be maritime in nature. *Kossick v. United Fruit Co.*, 1961, 365 U.S. 731, 735, 81 S.Ct. 886, 890, 9 L.Ed.2d 56, 60-61; *Hollister v. Luke Construction Co.*, 5 Cir. 1975, 517 F.2d 920, 921; *Richard Bertram & Co. v. Yacht Wanda*, 5 Cir. 1971, 447 F.2d 966, 967. In other words, there is some question as to whether the general maritime law or Florida law should apply here, since Florida was the state in which the shipbuilding contract was made and performed. On the one hand, a concern for the uniformity of the law to be applied in the resolution of controversies

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Rubber Co. v. USM Corp., 7 Cir. 1975, 508 F.2d 603, 617. Additional cases expounding the "clear and unequivocal" rule include: *Kansas City Power & Light Co. v. United Telephone Co.*, 10 Cir. 1972, 458 F.2d 177, 179; *Stromberg's v. Victor Gruen & Associates*, 10 Cir. 1967, 384 F.2d 163, 165; *National Motels, Inc. v. Howard Johnson, Inc.*, 4 Cir. 1967, 373 F.2d 375, 379-80; *United States v. Kelly*, 8 Cir. 1956, 236 F.2d 233, 237.

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founded on maritime torts militates in favor of construing this contract according to maritime principles. Furthermore, it might seem anomalous to hold that JIG III's case-in-chief must be interpreted according to general maritime principles, but that Atlantic Marine's defense is grounded in the law of Florida. On the other hand, since the contract was made and the PRINCESS built in Florida, it is certainly plausible to assume not only that Florida has a considerable interest in the resolution of this case, but also that the parties themselves expected that their contractual relations would be governed by Florida law. Fortunately, we need not decide this question, for we know that Florida requires clear and unequivocal disclaimers of liability for negligence in cases such as this one, *see Ivey Plants, Inc. v. FMC Corp.*, Fla. App. 1973, 282 So.2d 205, 209; *cf. University Plaza Shopping Center v. Stewart*, Fla. 1972, 272 So.2d 507, 511, and we are convinced that the general maritime law should not diverge from the general rule in this respect. *Cf. Dow Chemical Co. v. Dixie Carriers, Inc.*, 5 Cir. 1972, 463 F.2d 120, 121; *Jurisich v. United Gas Pipe Line Co.*, E.D.La. 1972, 349 F.Supp. 1227, 1229.

[10] When we examine Atlantic Marine's warranty, we find that the shipbuilder made a six-month warranty "against defective workmanship and materials" under which JIG III's remedy was to be limited to the repair and replacement of defective parts and materials. The provision cautioned that "no other warranty of any kind is made or implied . . . including any losses of time or resultant damages sustained by the owner . . ." Although Atlantic Marine contends that this language encompasses an adequate disclaimer of negligent design and construction, it is obvious that no specific mention is made either of "negligence" or of "tort liability." Atlantic Ma-

rine urges that the phrase *"defective* workmanship and materials" can mean nothing if not *"negligent* workmanship" and *"negligently* selected materials," and argues further that the disclaimer of liability for "losses of time or resultant damage" must also relate to potential losses from negligent design and construction. The problem with this argument is that it equates defects in the boat and losses resulting therefrom with tort liability, whereas it is perfectly possible that a design or part might somehow fail to comply with the agreed specifications and that such a failure could constitute a breach of contract without being tortious. The instant provision could certainly have been adopted with the intention of applying only to Atlantic Marine's potential contractual liability. *See Neville Chemical Co. v. Union Carbide Corp., supra,* 422 F.2d at 1220. Moreover, Atlantic Marine introduced no evidence at trial to show that the parties intended to alter the general rule of tort liability by allocating the risk of loss to JIG III in return for some diminution in the PRINCESS' price.[8]

8. The only evidence of intent on this point was the testimony of James I. George, Jr., who conducted JIG III's negotiations with Atlantic Marine. George stated that when he arrived at Atlantic Marine's shipyard to investigate the possibility of purchasing new boats for his fleet, the PRINCESS was already afloat and awaiting only the installation of her engines and navigational and fishing paraphernalia. As he was discussing the PRINCESS with Atlantic Marine's George Myers, Myers mentioned that the boat was equipped with a 4½-inch, cold-rolled steel shaft instead of the standard 4-inch, stainless steel variety. George had heard that cold-rolled steel was not as reliable a material as stainless steel, and so asked Myers whether Atlantic Marine's design was a safe one. Myers replied: "Jimmy, I don't think you will have any trouble because that's the reason we went from 4-inch to 4½-inch." This testimony certainly does not indicate that JIG III understood the risk involved in the PRINCESS' design and construction, or that JIG III agreed to assume that risk in return for a lower price.

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In these circumstances, we do not believe that the purported language of disclaimer adequately supports Atlantic Marine's contentions as to the parties' contractual intent. Even assuming *arguendo* that the language of Article 7 is ambiguous, it is certainly not clear and unequivocal in its warning that JIG III thereby waived its common law right to recover any damages to the PRINCESS which might result from Atlantic Marine's negligence. We conclude that Atlantic Marine's contractual defense must fail.

We do not read the Uniform Commercial Code as a categorical imperative exiling or outlawing the law of negligence between contracting parties. While there may be no magic words which are necessary to grant absolution for negligence, we have in this contract no plausible syllabization for such grace. The warranty words call for replacement of parts and materials, which language is not consonant with damage resulting from faulty design because the warranty verbiage is piecemeal in nature, while the tort theory of liability may involve more comprehensive damage. Limiting contractual language and limitless liability predicated upon negligence can coexist in situations such as this one, and this duality can only be foresworn by language which will bear no interpretation other than that the seller shall not be held responsible for his own negligent wrongdoing. One can buy a pig in a poke, but only if the parties fashion their contract and compound their words with the pig's possible infirmities in mind.

Affirmed.